Chong Chieng Jen v Government of State of Sarawak & Anor

FEDERAL COURT (PUTRAJAYA) — CIVIL APPEAL NO 01(f)-39–12 OF 2016(Q)
AHMAD MAAROP PCA, HASAN LAH, ABU SAMAH NORDIN, AZAHAR MOHAMED AND AZIAH ALI FCJJ
26 SEPTEMBER 2018

Civil Procedure — Summary disposal order — O 14A of the Rules of Court 2012 ('O 14A') — Defendant pleaded various defences to suit by government against him for defamation — Defendant applied under O 14A for four questions of law to be determined by High Court to finally decide suit — Questions of law did not include defences defendant had raised in the action — High Court decided three questions in plaintiffs' favour but its decision on the fourth question in defendant's favour was reversed in favour of plaintiffs on appeal — Whether appellate court was right to hold that since all questions were decided in plaintiffs' favour they had proven their case and were entitled to judgment and damages from defendant — Whether court had only decided legal question of whether impugned words were capable of bearing a defamatory meaning but not the question whether defendant had in fact defamed plaintiffs — Whether court had also not determined defendant's defences — Whether case had to be remitted back to High Court for trial to determine those outstanding issues

Tort — Defamation — Whether government or government body had right to sue an individual for damages for defamation — Whether s 3 of the Government Proceedings Act 1956 ('the GPA') gave government that right — Whether common law 'Derbyshire principle' that governments had no right to sue for defamation did not apply in Malaysia because s 3 of the GPA provided otherwise — Whether federal or state governments like natural persons had a reputation which was capable of being defamed

The issue in the instant case was whether a state government or a department or organ of that government ('the respondents') had the right to sue the appellant ('Chong') for defamation. Chong, an opposition state assemblyman and Member of Parliament, had alleged that the financial affairs of the Sarawak State Government had been mismanaged to the extent that the 'disappearance' of close to RM11 billion in state funds had not been explained. Chong's allegations were published in a daily newspaper, in a leaflet of his political party, as well as in an online news portal. Claiming that Chong had defamed them, the respondents sued him for damages. Chong relied on the defences of justification, fair comment and qualified privilege and also pleaded that the words complained of, in their natural and ordinary meaning, were not capable

of having a defamatory meaning. In any event, he said, based on the common law, the Defamation Act 1957, the right to freedom of speech and expression guaranteed under art 10 of the Federal Constitution ('art 10') and on grounds of public policy/public interest, the respondents had no locus standi to sue him for defamation. Chong applied under O 14A of the Rules of Court 2012 ('O 14A') to have the High Court determine four questions of law and that if those questions were determined in his favour the court should strike out the respondents' claim against him, The High Court determined three of the questions in favour of the respondents (against which decision Chong did not appeal) but answered the most critical question — ie, whether the respondents had the right to sue him for damages for defamation — in the negative and dismissed the respondents' claim. Relying on the decision of the House of Lords in *Derbyshire County Council v Times Newspaper Ltd & Ors* [1993] AC 534 ('the *Derbyshire* principle'), the High Court held that although a state government or a statutory body could sue and be sued, they did not have a right to sue for defamation. By a majority, the Court of Appeal ('COA') reversed the High Court's decision on that question. It further ruled that since all the questions posed in the O 14A application had been decided in the respondents' favour, the claim against Chong had been established and there was no need for the High Court to hear further evidence or arguments. The majority of the COA entered judgment for the respondents as per their statement of claim and ordered damages payable by Chong to be assessed. The majority of the COA interpreted s 3 of the Government Proceedings Act 1956 ('the GPA') to mean that if one private individual could sue another for defamation the government could similarly sue a private individual for the same cause of action. The majority rejected the appellant's argument that government and its bodies had no reputation that needed to be protected by the law of defamation, holding that a government's reputation could be injured by libel if the impugned words tended to lower its reputation in the estimation of right-thinking members of the public or exposed it to hatred, contempt or ridicule. The Federal Court granted Chong leave to appeal against the majority COA's decision on the question whether: (a) s 3 of the GPA and s 3(1)(c) of the Civil Law Act 1956 ('the CLA') precluded the *Derbyshire* principle from being applied against the respondents; and (b) whether if a party had applied under O 14A to determine only some of the issues that it had pleaded, it was deemed to have abandoned other causes of action, issues or defences that it had pleaded but which were not made the subject of the O 14A application. In the instant case, the minority judgment of the COA ruled that based on the *Derbyshire* principle, the respondents had no right to sue for defamation and that there was no reason why, under the CLA, that principle should not be adopted in Malaysia as it was consistent with art 10 and the requirement for government to be accountable and transparent. The minority judgment ruled that s 3 of the GPA did not specifically say that government had a right to sue for defamation. At the instant appeal hearings, Chong submitted that various jurisdictions around the world had adopted the *Derbyshire* principle to support the view that

democratically-elected governments or government bodies should be open to public criticism and not fetter the right of free speech and expression of its critics with the probability that they could be sued for defamation. Chong also argued that since neither the GPA nor the Defamation Act 1957 specifically allowed government to sue for defamation, the guarantee of freedom of speech and expression enshrined in art 10 should not be unduly fettered, especially in the instant case where a citizen should have the right to query the expenditure of considerable public funds by the state government. The respondents, on the other hand, argued that the Derbyshire principle, being part of English common law, could not be adopted in Malaysia because the respondents' right to sue for defamation was statutorily conferred by s 3 of the GPA. They also said the right to freedom of speech and expression guaranteed under art 10 was not absolute but curtailed by various limitations and restrictions, including laws relating to defamation.

Held, unanimously: (i) affirming the COA's majority decision that the respondents had the right to sue and maintain an action for damages for defamation against Chong; (ii) setting aside the COA's majority decision to enter judgment and order damages to be assessed against Chong; and (iii) remitting the case back to the High Court for trial to determine whether the impugned words did, in fact, defame the respondents, as well as to determine the defences raised by Chong and, if necessary, the damages to be assessed:

(1) The statutory right of the government to sue in civil proceedings under s 3 of the GPA, including for defamation, was not subject to the common law of England because the words 'written law' in that section was not defined by s 3 of the Interpretation Acts 1948 and 1967 to include the common law of England. Hence, the common law principle expounded in *Derbyshire* did not apply (see paras 35–37 & 45).

(2) The GPA did not preclude the government from taking civil action for defamation. Indeed, s 2(2) of that Act, which defined 'Government' to include the federal government and the state governments, provided a wide definition of 'civil proceedings' to include any proceeding whatsoever of a civil nature before a court. Thus, under s 3 of the GPA, if an individual made an allegation critical of a government, which allegation if made against another individual would have afforded that other individual ground to sue, then the government could sue in defamation. There was nothing under s 3 or under the GPA as a whole which could be construed as prohibiting or restricting the government from suing in defamation. Chong's submission that government did not have a reputation that could be defamed could not be accepted. The majority of the COA had rightly decided on this point (see paras 38–39 & 42).

(3) When faced with a situation whether a particular principle of common law of England was applicable in Malaysia, the court first had to determine whether there was any written law (on the point) in force in Malaysia. If there was, the court did not have to look anywhere else. In the instant case, the GPA was the specific law in force which governed proceedings by and against the Federal and State governments. The right of the government, including the Sarawak State Government to sue, including for defamation, was statutorily provided for under s 3 of the GPA. Hence, the English common law principle expounded in *Derbyshire* did not apply (see para 45).

(4) The right to freedom of speech and expression guaranteed under art 10(1)(a) of the Federal Constitution was not absolute or unfettered but was subject to restrictions imposed by art 10(2)(a) including the law of defamation (see paras 46–47).

(5) In an action for defamation, the court's first task was to determine whether the words complained of were capable of bearing a defamatory meaning. This was a question of law which turned upon the construction of the words published. The court's next task was to ascertain whether the words complained of were in fact defamatory. This was a question of fact which depended upon the circumstances of the particular case. In the O 14A application in the instant case, only the above question of law was determined by the High Court in the affirmative. The High Court did not determine whether the impugned words were in fact defamatory because that question was not in the O 14A application. Furthermore, no question relating to the defences pleaded by Chong were raised or determined by the High Court judge. As such, the majority of the COA erred in holding that since all the four questions in the O 14A application had been answered in favour of the respondents, their claim had been established without the need to hear any further evidence or arguments. The COA also erred in entering judgment for the respondents and ordering that the damages payable by Chong be assessed (see paras 62 & 64–65).

[Bahasa Malaysia summary

Isu dalam kes ini adalah sama ada kerajaan negeri atau jabatan atau organ kerajaan itu ('responden') mempunyai hak untuk menyaman perayu ('Chong') untuk fitnah. Chong, ADUN pembangkang dan Ahli Parlimen, telah mendakwa bahawa hal kewangan Kerajaan Negeri Sarawak telah disalah urus setakat mana 'kehilangan' hampir RM11 bilion dalam dana negeri belum dijelaskan. Tuduhan Chong telah diterbitkan dalam akhbar harian, dalam risalah parti politiknya, serta dalam portal berita dalam talian. Mendakwa bahawa Chong telah memfitnah mereka, responden menyaman beliau untuk ganti rugi. Chong bergantung pada pembelaan justifikasi, ulasan adil dan perlindungan bersyarat dan juga memplid bahawa kata-kata yang diadukan

itu, dalam makna semula jadi dan biasa, tidak mampu mempunyai makna fitnah. Dalam apa jua keadaan, katanya, berdasarkan undang-undang umum, Akta Fitnah 1957, hak kebebasan bersuara dan ekspresi yang dijamin di bawah perkara 10 Perlembagaan Persekutuan ('perkara 10') dan berdasarkan alasan dasar awam/kepentingan awam, responden tidak mempunyai locus standi untuk menyamannya untuk fitnah. Chong memohon di bawah A 14A Kaedah-Kaedah Mahkamah 2012 ('A 14A') untuk Mahkamah Tinggi menentukan empat soalan undang-undang dan bahawa jika soalan-soalan itu ditentukan memihak kepadanya mahkamah hendaklah membatalkan tuntutan responden terhadapnya, Mahkamah Tinggi menentukan tiga daripada soalan memihak kepada responden (terhadap keputusan yang Chong tidak merayu) tetapi menjawab soalan paling kritikal iaitu, sama ada responden mempunyai hak untuk menyamannya untuk ganti rugi kerana fitnah — dalam negatif dan menolak tuntutan responden. Bergantung kepada keputusan *Derbyshire County Council v Times Newspaper Ltd & Ors* [1993] AC 534 ('prinsip *Derbyshire*'), Mahkamah Tinggi memutuskan bahawa walaupun kerajaan negeri atau badan berkanun boleh menyaman dan disaman, mereka tidak mempunyai hak untuk menyaman kerana fitnah. Dengan majoriti, Mahkamah Rayuan ('MR') telah mengakas keputusan Mahkamah Tinggi mengenai soalan itu. Ia seterusnya memutuskan bahawa oleh kerana semua soalan yang ditimbulkan dalam permohonan A 14A telah diputuskan memihak kepada responden, tuntutan terhadap Chong telah dibuktikan dan tiada keperluan untuk Mahkamah Tinggi untuk mendengar keterangan lanjut atau hujahan. Majoriti MR memasuki penghakiman untuk responden seperti pernyataan tuntutan mereka dan memerintahkan ganti rugi yang perlu dibayar oleh Chong untuk dinilai. Majoriti MR mentafsirkan s 3 Akta Prosiding Kerajaan 1956 ('APK') yang bermaksud bahawa jika seseorang individu perseorangan boleh menyaman orang lain untuk fitnah kerajaan juga boleh menuntut individu persendirian untuk tindakan yang sama. Majoriti menolak hujahan perayu bahawa kerajaan dan badannya tidak mempunyai reputasi yang perlu dilindungi oleh undang-undang fitnah, memandangkan reputasi kerajaan boleh cedera oleh fitnah jika kata-kata fitnah itu cenderung menurunkan reputasinya dalam pandangan orang awam yang berfikiran waras atau mendedahkannya kepada kebencian, penghinaan atau cemuhan. Mahkamah Persekutuan membenarkan kebenaran Chong untuk merayu terhadap keputusan majoriti MR mengenai soalan sama ada: (a) s 3 APK dan s 3(1)(c) Akta Undang-Undang Sivil 1956 ('US') dihalang daripada prinsip *Derbyshire* daripada digunakan terhadap responden; dan (b) sama ada jika satu pihak telah memohon di bawah A 14A untuk menentukan hanya beberapa isu yang telah dikemukakan, ia dianggap telah menggugurkan kausa tindakan yang lain, isu atau pembelaan lain yang diplid tetapi yang tidak dibuat subjek permohonan A 14A. Dalam kes ini, penghakiman minoriti MR memutuskan bahawa berdasarkan prinsip *Derbyshire*, responden tidak berhak untuk menuntut fitnah dan tiada alasan mengapa, di bawah US, bahawa prinsip itu tidak boleh diterima pakai di Malaysia kerana ia konsisten dengan perkara 10

dan keperluan untuk kerajaan untuk menjadi bertanggungjawab dan telus. Penghakiman minoriti memutuskan bahawa s 3 APK tidak secara khusus mengatakan bahawa kerajaan berhak untuk menyaman untuk fitnah. Pada pendengaran rayuan ini, Chong mengemukakan bahawa pelbagai bidang kuasa di seluruh dunia telah menggunakan prinsip *Derbyshire* untuk menyokong pandangan bahawa kerajaan atau badan kerajaan yang dipilih secara demokratik harus terbuka kepada kritikan awam dan tidak memandang hak kebebasan bersuara dan ungkapan pengkritiknya dengan kebarangkalian bahawa mereka boleh didakwa kerana fitnah. Chong juga berhujah bahawa oleh kerana bukan APK mahupun Akta Fitnah 1957 secara khusus membenarkan kerajaan untuk menyaman untuk fitnah, jaminan kebebasan bersuara dan ekspresi yang termaktub dalam perkara 10 tidak seharusnya terlalu terikat, terutamanya dalam kes ini di mana seorang warganegara sepatutnya mempunyai hak untuk mengkaji perbelanjaan dana awam yang banyak oleh kerajaan negeri. Responden, sebaliknya, berpendapat bahawa prinsip *Derbyshire*, yang merupakan sebahagian daripada undang-undang umum Inggeris, tidak boleh diterima pakai di Malaysia kerana hak responden untuk menyaman untuk fitnah adalah diberikan secara statutori oleh s 3 APK. Mereka juga mengatakan hak untuk kebebasan bersuara dan ekspresi yang dijamin di bawah perkara 10 adalah tidak mutlak tetapi dibatasi oleh pelbagai batasan dan sekatan, termasuk undang-undang yang berkaitan dengan fitnah.

Diputuskan, sebulat suara: (i) mengekalkan keputusan majoriti COA bahawa responden mempunyai hak untuk mendakwa dan mengekalkan tindakan untuk ganti rugi kerana fitnah terhadap Chong; (ii) mengetepikan keputusan majoriti COA untuk memasukkan penghakiman dan ganti rugi untuk dinilai terhadap Chong; dan (iii) meremit semula kes ke Mahkamah Tinggi untuk perbicaraan untuk menentukan sama ada kata-kata fitnah itu, sebenarnya, memfitnah responden, serta untuk menentukan pembelaan yang dibangkitkan oleh Chong dan, jika perlu, ganti rugi untuk dinilai:

(1) Hak statutori kerajaan untuk menyaman dalam prosiding sivil di bawah s 3 APK, termasuk untuk fitnah, tidak tertakluk kepada undang-undang umum England kerana perkataan 'undang-undang bertulis' dalam seksyen itu tidak ditakrifkan oleh s 3 Akta Tafsiran 1948 dan 1967 untuk meliputi undang-undang umum England. Oleh itu, prinsip undang-undang umum yang diterangkan dalam *Derbyshire* tidak terpakai (lihat perenggan 35–37 & 45).

(2) APK tidak menghalang kerajaan mengambil tindakan sivil kerana fitnah. Sesungguhnya, s 2(2) Akta tersebut, yang mentakrifkan 'Kerajaan' untuk meliputi kerajaan persekutuan dan kerajaan negeri, memberikan takrifan 'prosiding sivil' yang merangkumi apa-apa prosiding yang bersifat sivil di hadapan mahkamah. Oleh itu, di bawah s 3 APK, jika seorang individu membuat tuduhan yang kritikal terhadap kerajaan, yang mana tuduhan jika dibuat terhadap individu lain akan memberikan alasan individu lain

untuk menyaman, maka kerajaan boleh menyaman untuk fitnah. Tiada apa-apa di bawah s 3 atau di bawah APK secara keseluruhannya yang boleh ditafsirkan sebagai melarang atau menyekat kerajaan daripada menyaman untuk fitnah. Hujahan Chong bahawa kerajaan tidak mempunyai reputasi yang boleh difitnah tidak boleh diterima. Majoriti MR telah memutuskan dengan tepat pada ketika ini (lihat perenggan 38–39 & 42).

(3) Apabila berhadapan dengan keadaan sama ada prinsip tertentu undang-undang umum England terpakai di Malaysia, mahkamah terlebih dahulu perlu menentukan sama ada terdapat mana-mana undang-undang bertulis (pada ketika itu) yang berkuatkuasa di Malaysia. Sekiranya ada, mahkamah tidak perlu melihat tempat lain. Dalam kes ini, APK adalah undang-undang khusus yang berkuatkuasa yang mentadbir prosiding oleh dan terhadap kerajaan persekutuan dan negeri. Hak kerajaan, termasuk Kerajaan Negeri Sarawak untuk menyaman, termasuk untuk fitnah, diperuntukkan secara statutori di bawah s 3 APK. Oleh itu, prinsip undang-undang umum Inggeris yang diterangkan di *Derbyshire* tidak terpakai (lihat perenggan 45).

(4) Hak kebebasan bersuara dan ekspresi yang dijamin di bawah perkara 10(1)(a) Perlembagaan Persekutuan adalah tidak mutlak atau tidak terbatas tetapi tertakluk kepada sekatan yang dikenakan oleh perkara 10(2)(a) termasuk undang-undang fitnah (lihat perenggan 46–47).

(5) Dalam tindakan untuk fitnah, tugas pertama mahkamah adalah untuk menentukan sama ada kata-kata aduan itu mampu menimbulkan maksud fitnah. Ini adalah persoalan undang-undang yang berkenaan tafsiran kata-kata yang diterbitkan. Tugas mahkamah seterusnya adalah memastikan sama ada kata-kata aduan itu sebenarnya adalah fitnah. Ini adalah persoalan fakta yang bergantung kepada keadaan kes tertentu. Dalam permohonan A 14A dalam kes ini, hanya soalan undang-undang di atas ditentukan oleh Mahkamah Tinggi dalam afirmatif. Mahkamah Tinggi tidak menentukan sama kata-kata fitnah itu sebenarnya memfitnah kerana soalan itu tiada dalam permohonan A 14A. Selain itu, tiada persoalan yang berkaitan dengan pembelaan yang dikemukakan oleh Chong telah dibangkitkan atau ditentukan oleh hakim Mahkamah Tinggi. Justeru, majoriti MR terkhilaf dalam memutuskan bahawa oleh kerana semua empat soalan dalam permohonan A 14A telah dijawab memihak kepada responden, tuntutan mereka telah dibuktikan tanpa perlu mendengar apa-apa keterangan atau hujahan lanjut. MR juga terkhilaf dalam memasuki penghakiman untuk responden dan memerintahkan bahawa ganti rugi yang perlu dibayar oleh Chong untuk dinilai (lihat perenggan 62 & 64–65).]

Notes

For cases on summary disposal order in general, see 2(5) *Mallal's Digest* (5th Ed, 2017 Reissue) paras 9609–9615.

For cases on defamation in general, see 12(1) *Mallal's Digest* (5th Ed, 2017 Reissue) paras 394–957.

Cases referred to

Abdul Rahman Talib v Seenivasagam & Anor [1966] 2 MLJ 66, FC (refd)

Ballina Shire Council v Ringland [1994] 33 NSWLR 680, CA (refd)

Berkoff v Burchill and another [1996] 4 All ER 1008, CA (refd)

Bognor Regis Urban District Council v Campion [1972] 2 All ER 61; [1972] 2 QB 169, QBD (refd)

British Coal Corporation v National Union of Mineworkers and Another [1996] Lexis Citation 5736; [1996] EWHC 380 (QB), QBD (refd)

Chew Peng Cheng v Anthony Teo Tiao Gin [2008] 5 MLJ 577, HC (refd)

Chok Foo Choo @ Chok Kee Lian v The China Press Bhd [1999] 1 MLJ 371, CA (refd)

City of Chicago v Tribune Co (1923) 139 NE 86, SC (refd)

Derbyshire County Council v Times Newspapers Ltd and others [1993] AC 534, HL (not folld)

Die Spoorbond v South African Railways [1946] AD 999 (refd)

Goldsmith and another v Bhoyrul and others [1998] QB 459, QBD (refd)

Jameel and another v Wall Street Journal Europe SPRL [2006] 4 All ER 1279; [2006] UKHL 44, HL (refd)

Kerajaan Negeri Kelantan v Petroliam Nasional Bhd and other appeals [2014] 6 MLJ 31; [2014] 7 CLJ 597, FC (refd)

Kerajaan Negeri Terengganu & Ors v Dr Syed Azman Syed Ahmad Nawawi & Ors (No 1) [2013] 7 MLJ 52; [2013] 1 CLJ 107, HC (refd)

Lee Hsien Loong v Singapore Democratic Party and others and another suit [2007] 1 SLR 675; [2006] SGHC 220, HC (refd)

Ling Wah Press (M) Sdn Bhd & Ors v Tan Sri Dato Vincent Tan Chee Yioun [2000] 4 MLJ 77; [2000] 3 CLJ 728, FC (refd)

Majlis Perbandaran Ampang Jaya v Steven Phoa Cheng Loon & Ors [2006] 2 MLJ 389, FC (refd)

New South Wales Aboriginal Land Council v Jones [1998] 43 NSWLR 300, CA (refd)

PP v Azmi bin Sharom [2015] 6 MLJ 751; [2015] 8 CLJ 921, FC (refd)

Pang Fee Yoon v Piong Kien Siong & Ors [1999] 3 MLJ 189; [1999] 8 CLJ 383, HC (refd)

Petroleum Nasional Bhd v Kerajaan Negeri Terengganu [2004] 1 MLJ 8, CA (refd)

Pooley v Driver (1876) 5 Ch D 458, Ch D (refd)

Posts and Telecommunications Corporation v Modus Publications (Pvt) Ltd 1998 (3) SA 1114, HC (refd)

Public Services Commission Malaysia & Anor v Vickneswary a/p RM Santhivelu (substituting M Senthivelu a/l R Marimuthu, deceased) [2008] 6 MLJ 1; [2008] 6 CLJ 573, FC (refd)
R Rajagopal v State of TN 1995 AIR 264; 1994 SCC (6) 632, SC (refd)
Reynolds v Times Newspapers Ltd and others [1999] 4 All ER 609; [2001] 2 AC 127, HL (refd)
Sim v Stretch [1936] 2 All ER 1237, HL (refd)
Soh Chun Seng v CTOS-EMR Sdn Bhd [2003] 4 MLJ 180; [2004] 5 CLJ 46, HC (refd)
Syarikat Bekalan Air Selangor Sdn Bhd v Tony Pua Kiam Wee [2015] 6 MLJ 187, FC (refd)
The New Straits Times & Ors v Lim Guan Eng Civil Appeal Nos W-02(NCVC)(A)-685–04 of 2015, W-02(NCVC)(A)-686–04 of 2015, W-02(NCVC)(A)-695–04 of 2015 and W-02(NCVC)(A)-696–04 of 2015 (refd)
Utusan Melayu (M) Bhd v Dato' Sri DiRaja Hj Adnan bin Hj Yaakob [2016] 5 MLJ 56; [2016] 5 CLJ 857, CA (refd)

Legislation referred to

Civil Law Act 1956 s 3(1), (1)(c)
Courts of Judicature Act 1964 s 78(1)
Defamation Act 1957 s 8
Federal Constitution art 10, 10(1)(a), (1)(b), (2)(a)
Government Proceedings Act 1956 ss 2(2), 3
Interpretation Acts 1948 and 1967 s 3
Rules of Court 2012 O 14A

Appeal from: Civil Appeal No Q-01–210–06 of 2014 (Court of Appeal, Kuching)

Ranjit Singh s/o Harbinder Singh (Chong Siew Chiang, Tan Kee Heng, Carol Lua and Michael Kong Feng Nian with him) (Chong Brothers Advocates) for the appellant.
JC Fong (Mohd Adzrul Adzlan and Voon Yan Sin with him) (Senior Legal Advisor, Sarawak State Attorney-General's Chambers) for the respondents.

Ahmad Maarop PCA:

[1] This judgment is prepared pursuant to s 78(1) of the Courts of Judicature Act 1964, as our learned brother, Justice Abu Samah Nordin has since retired.

[2] In this judgment the parties will be referred to as they were in the proceedings in the High Court.

[3] This case concerns the defendant's appeal against the majority decision of the Court of Appeal on 7 April 2016, reversing the decision of the High Court Kuching which had, on 28 April 2014, dismissed the plaintiffs' claim for libel against the defendant.

[4] The leave to appeal to this court was granted on the following questions:

(a) whether the Government Proceedings Act 1956 ('Act 359'), and in particular s 3 therein, precludes the principle in *Derbyshire County Council v Times Newspapers Ltd and others* [1993] AC 534 ('Derbyshire') to be extended to the Government of Sarawak?

(b) whether s 3(1)(c) of the Civil Law Act 1956 ('Act 67') precludes the principle in *Derbyshire* to be extended to the Government of Sarawak? and

(c) whether a party (having pleaded various causes of action, issues or defences, as the case may be), who makes an application under O 14A of the Rules of Court 2012 ('the ROC') to determine one or more of the issues (but not all) pleaded by the party, is deemed to have elected to have abandoned all other causes of action, issues or defences, pleaded by the party?

[5] The background facts leading to the present appeal are these. The first plaintiff is the government of the State of Sarawak. The second plaintiff is the state financial authority of the first plaintiff. The defendant, the then Vice Chairman of Democratic Action Party ('DAP') was a Member of Parliament for Bandar Kuching as well as a member of the Sarawak State Assembly for Kota Sentosa. The plaintiffs sued the defendant for libel, alleging that the defendant had made defamatory statements concerning mismanagement of the state financial affairs. The statement was published in the *Sin Chew Daily* on 3 January 2013 and in the DAP's leaflet, both in Chinese and English. The statement was also published in an online news portal *Malaysiakini* on 18 February 2013. The DAP's leaflet contains a drawing of the figure 'RM11,000,000,000.00' being sucked into a whirl pool with a black hole at the centre.

[6] Among the statements which were attributed to the defendant as translated into English (see Appendix D to the amended statement of claim) are as follows:

> Chong said since 2006, there is an item in the State Budget which appears mysterious, namely 'Government Allocation For Trust Fund' and this Trust Fund is made up of 50% of the Development Fund. The Chief Minister being the Minister of Finance failed to explain who are the beneficiaries of such a big allocation of fund. He said that DAP ADUN have raised this issue and the answer is that the Chief Minister has approved this fund to corporations, companies or organisations which

are approved to promote economic, social or educational activities or development of Sarawak. Chong said that these agencies are cronies and the so-called development of Sarawak is really meant for development of his family business. What is meant for public becomes something personal. Often state land is given out to the family companies at a very low price so that the companies can reap huge profits — and this is what BN called economic development of Sarawak. He said such fund allocation contravenes parliamentary democracy because under democratic practice, the government must account for every cent it has spent and it has to be properly accounted for in the Council Negeri. Now Chong asked why did the state government hide such a big amount of money and where did they go to. Why got such a big allocation? Is there anything that the government cannot reveal? Chong continued to say state budget for the past 7 years is this blackhole where RM10 billion disappeared to and this year RM1.8 billion will disappear into this blackhole. He said if this RM10 billion has not disappeared into the blackhole, Sarawak can upgrade the Pan Borneo Trunk Road into dual carriageway, provide 10,000 scholarship for students doing medical courses, build 100,000 units medium cost house to reduce the financial burden of the people, can also give every Sarawakian RM3,700 or can build 20 general hospitals or build 2,000 1st class schools. *Chong said whenever people talked about the lack of facilities, the government always give a lame excuse of not having enough fund but right unknown to us there is this RM11 billion disappearing into the blackhole. Chong said this proved a point that the state does not have money its because state money going somewhere else and Chong warned the state government that they may be able to get away from the Opposition questioning but they cannot get away from the people as a whole.*

[7] The defendant pleaded and relied on the following defences:

(a) the plaintiff have no locus standi to maintain an action for defamation against the defendant and it would be against public policy and public interest for such an action to be instituted and also against the common law as well as the principle of freedom of speech and expression;

(b) the defendant did not publish the impugned words;

(c) the words complained of were, in their natural and ordinary meaning not capable of a defamatory meaning;

(d) justification;

(e) s 8 of the Defamation Act 1957;

(f) fair comment; and

(g) qualified privilege.

[8] On 26 February 2014, the defendant filed a notice of application, applying under O 14A of the Rules of Court 2012 for four questions of law to be determined by the High Court. If the questions were determined in his favour, he prayed that the amended statement of claim be struck out. The questions of law are as follows:

A (1) whether the abovenamed first plaintiff, being the State Government of Sarawak, and/or the second plaintiff, being government department and an organ of the government have the right to sue and to maintain an action for damages for defamation against the defendant;

B (2) whether the actual or precise words complained of and alleged to be defamatory of the plaintiffs and/or the actual original words alleged to be defamatory of the plaintiffs in the alleged DAP's leaflet (which were written in both Chinese and English languages) and/or in *Sin Chew Daily News* dated 3 January 2013 (which were written in Chinese language) must be specifically pleaded or set out in the amended statement of claim;

C (3) whether the words complained of and set out in para 6 of the amended statement of claim derived from the alleged *Malaysiakini* dated 18 February 2013, are capable of bearing any defamatory meaning, and/or are capable of being understood to refer to the first and second

D plaintiffs as a matter of law; and

(4) in an action for libel, whether it is permissible in law to group together several articles from different publications in the amended statement of claim, without spelling out separately and distinctly what is the precise and pleaded defamatory meaning(s) or imputation(s) that each article is

E capable of conveying against the person defamed.

[9] The learned judge of the High Court determined the last three questions in favour of the plaintiffs.

F

[10] Relying on the principle propounded by the House of Lords in *Derbyshire County Council v Times Newspapers Ltd and others* [1993] AC 534, the learned judge determined the first question in favour of the defendant. The learned judge held that 'although a state government or a statutory body can

G sue and be sued, that right to sue does not extend to the right to sue for defamation. The first question is therefore answered in the negative'. Following the answer as such to the first question, the learned judge dismissed the plaintiffs' claim.

H **[11]** No appeal was filed by the defendant against the decision of the learned High Court judge in respect of questions 2–4 which were decided in favour of the plaintiffs. Hence, in the Court of Appeal, the only issue for determination was that relating to question 1, which in substance is whether the plaintiffs could sue for defamation. The majority of the panel members of the Court of

I Appeal hearing the appeal answered question 1 in the affirmative.

[12] Having answered question 1 in favour of the plaintiffs, consequentially, the majority of the panel members of the Court of Appeal did not think that it was proper to remit the case back to the High Court for trial as that would,

according to the majority, defeat the whole purpose behind O 14A procedure — which was to save the expense and avoid delay which would otherwise arise if the action were to proceed to full trial.

[13] The majority held that, since all the four questions were answered in favour of the plaintiffs, (including question 1 which was answered in favour of the plaintiffs by the majority), the claim of the plaintiffs had been established without any further need to hear evidence from the defendant, nor for further argument before the learned High Court judge. In the circumstances, judgment was entered against the defendant in terms of prayers (1) and (2) of the amended statement of claim. Damages was ordered to be assessed by the Deputy Registrar of the High Court. More of this later when we deal with the propriety of the aforesaid order.

[14] The minority judgment of the Court of Appeal upheld the High Court decision that the State Government of Sarawak and an organ of the government have no right to sue for defamation based upon the *Derbyshire* principle. The minority of the Court of Appeal was of the view that s 3 of Act 359 is a general piece of legislation to cloth the government with the legal status to sue and be sued, nothing more or nothing less. It only gives the government the statutory right to mount any legal action in any civil proceedings which are available to and among private citizens of the country. However, that does not answer the second half of the question and that is whether the government possess a 'cause of action' in an action for defamation. Only by asking the second half of the question and getting an answer will there be a complete question and answer. That answer can only be found in the law of defamation independent of s 3 of Act 359.

[15] On Act 67, the minority said:

> My answer to that is simply the development of common law in Malaysia rests squarely in our hands and the courts are duty bound to develop the same to suit the times that we live in. It may well be that we adopt the English common law but once adopted it becomes our common law. Hence s 3(1)(c) of the Civil Law Act is no impediment to our Courts if and when they deem it fit to develop our common law.

[16] The minority saw no reason why we should not adopt the *Derbyshire* principle:

> Hence, I see no reason why we should not adopt the *Derbyshire* principle in our defamation law as it would be consistent not only to art 10 of the Federal Constitution but to all the hallmarks of a modern democracy. Those hallmarks, among others, relate to the need for accountability, the need for transparency, the need for freedom of expression and the need for a healthy and responsible fourth estate.

THE DEFENDANT'S SUBMISSION

[17] The first point made by the learned counsel in his submission was that *Derbyshire* in fact followed previous cases decided in the United States and South Africa, which held that any democratically-elected government body or indeed any government body should be open to uninhibited public criticism, and therefore was not entitled to sue for defamation. Learned counsel submitted that *Derbyshire* principle had been applied in various jurisdictions around the world, such as South Africa, Australia, Zimbabwe, India, Singapore, the United States of America and England. Reference was made to the following cases:

(a) *Die Spoorbond v South African Railways* [1946] AD 999;

(b) *Ballina Shire Council v Ringland* [1994] 33 NSWLR 680;

(c) *New South Wales Aboriginal Land Council v Jones* [1998] 43 NSWLR 300;

(d) *Goldsmith and another v Bhoyrul and others* [1998] QB 459;

(e) *Posts and Telecommunications Corporation v Modus Publications (Pvt) Ltd* 1998 (3) SA 1114;

(f) *R Rajagopal v State of TN* 1995 AIR 264; 1994 SCC (6) 632;

(g) *Lee Hsien Loong v Singapore Democratic Party and others and another suit* [2007] 1 SLR 675; [2006] SGHC 220;

(h) *City of Chicago v Tribune Co* (1923) 139 NE 86; and

(i) *British Coal Corporation v National Union of Mineworkers and Another* [1996] Lexis Citation 5736; [1996] EWHC 380 (QB).

[18] Secondly, according to learned counsel, both the English common law and the UK statutory provision relating to defamation were the springboard of Malaysian defamation law. He submitted that continued acceptance of the English decisions and common law principles on defamation was evident from examples such as the adoption of *Reynolds'* defence introduced by the House of Lords in *Reynolds v Times Newspapers Ltd and others* [1999] 4 All ER 609; [2001] 2 AC 127 which was affirmed in *Jameel and another v Wall Street Journal Europe SPRL* [2006] 4 All ER 1279; [2006] UKHL 44. *Reynolds'* defence was discussed and accepted by this court in *Syarikat Bekalan Air Selangor Sdn Bhd v Tony Pua Kiam Wee* [2015] 6 MLJ 187. Learned counsel argued that the cut-off date of 12 December 1949 which purportedly preclude the adoption of the *Derbyshire* principle in the Malaysian common law did not feature at all in the deliberations of Malaysian courts regarding the acceptance of the *Reynolds'* defence. Learned counsel also submitted that there were several decisions of the local superior courts which stated that the law of defamation in Malaysia

closely followed the English law of defamation. In support of his submission he cited the following cases:

(a) *Abdul Rahman Talib v Seenivasagam & Anor* [1966] 2 MLJ 66;

(b) *Kerajaan Negeri Terengganu & Ors v Dr Syed Azman Syed Ahmad Nawawi & Ors (No 1)* [2013] 7 MLJ 52; [2013] 1 CLJ 107;

(c) *The New Straits Times & Ors v Lim Guan Eng* Civil Appeal Nos W-02(NCVC)(A)-685–04 of 2015, W-02(NCVC)(A)-686–04 of 2015, W-02(NCVC)(A)-695–04 of 2015 and W-02(NCVC)(A)-696–04 of 2015;

(d) *Utusan Melayu (M) Bhd v Dato' Sri DiRaja Hj Adnan bin Hj Yaakob* [2016] 5 MLJ 56; [2016] 5 CLJ 857;

(e) *Soh Chun Seng v CTOS-EMR Sdn Bhd* [2003] 4 MLJ 180; [2004] 5 CLJ 46;

(f) *Pang Fee Yoon v Piong Kien Siong & Ors* [1999] 3 MLJ 189; [1999] 8 CLJ 383; and

(g) *Chew Peng Cheng v Anthony Teo Tiao Gin* [2008] 5 MLJ 577.

[19] Learned counsel further submitted that there was no specific provision in Act 359 allowing the government to sue for defamation. There was also no specific provision in the Defamation Act 1957 (Act 286) allowing the government to sue for defamation. Learned counsel argued that s 3 of Act 359 was simply a general and neutral provision on legal proceedings instituted by the government. Act 359 could not be construed to have any bearing on the common law principles relating to whether the government has a cause of action in defamation. Learned counsel submitted that in the absence of any such specific provisions, the constitutional guarantee of freedom of expression enshrined under art 10 of the Federal Constitution became crucial. He submitted that any inroad into the constitutional rights of citizens can only be made by clear words employed in Acts of Parliament, in the absence of which the constitutional rights must remain intact in any given situation. He referred to *Utusan Melayu (M) Bhd v Dato' Sri DiRaja Hj Adnan bin Hj Yaakob* [2016] 5 MLJ 56; [2016] 5 CLJ 857, where the Court of Appeal stated that the real issue was not the applicability or otherwise of the common law *Derbyshire* principle but rather 'as public interest dictates, a democratically elected government and its officials should be open to public criticism and that it is advantageous that every responsible citizen should not be in any way fettered in his statements where it concerns the affairs and administration of the government'.

[20] Thus, according to learned counsel, the proposition that public officials and/or governmental bodies ought not to be permitted to sue in their official

capacity because it amounts to a breach of art 10 of the Federal Constitution, was not one that could be easily discounted. He contended that without clear words in the Act of Parliament (Act 286), the fundamental right of free speech encapsulated under art 10 of the Federal Constitution could not be eroded. According to him, the absence of any such clear words was observed by the Court of Appeal in *Utusan Melayu (M) Bhd v Dato' Sri DiRaja Hj Adnan bin Hj Yaakob*:

> We do not find any provisions in Act 286 which in clear and unequivocal terms allows the government or any individual members in the government who have conduct of public affairs to sue for defamation in their official capacity to protect their reputation against any person for his public critiques of the government and any such members. The absence of any such provisions would significantly show that the constitutional guarantee under art 10(1)(a) remains intact and every citizen has the right to exercise the right to freedom of speech and expression including the right to discuss their government and public officials so long as it is so exercised subject to and within the permissible restrictions as the law may impose.

[21] Learned counsel submitted that to permit the government to commence civil actions to protect its governing reputation against members of the public or private entities who voice their opinions, would produce the chilling effect and undesirable fetter on the right of freedom of expression. In the present case, the constitutional right of the citizen to query the expenditure of considerable public funds by the state government ought to be protected. Learned counsel contended that the *Derbyshire* principle was based on principle of public interest. Public interest does not favour the right of the government or governmental bodies to sue for libel or slander. On the contrary, it is against the public interest to allow them to do so. The *Derbyshire* principle is also based on the fundamental right of freedom of speech and expression under the English common law. In Malaysia, the right of freedom of speech and expression is guaranteed by art 10(1)(a) of the Federal Constitution. Such right is essential to members of the public to act as a check and balance of the Executive or government conducting or managing public affairs of the government, without fear of being called to answer civil action for defamation. Besides, the Federal Constitution, being the supreme law of the land must be given its full effect in the event of any conflict with the other legislations.

[22] On Act 67, learned counsel submitted that the important issue in this appeal was not simply whether the English decisions or development of the defamation law in England after the 'cut-off' date be rejected or completely ignored. To further develop the defamation law in Malaysia, the local courts should be free to accept the English decisions and the common law principles (irrespective of the date of the decisions) if they are found to be suitable to local circumstances and would not cause injustice to local inhabitants.

[23] In conclusion, learned counsel submitted that the plaintiff had no locus standi to sue the defendant for libel in this case. He argued that not only was there no public interest favouring the right of the plaintiffs to sue, it was contrary to the public interest that they should have that rights. Besides, according to him, it was directly against the fundamental right of freedom of expression under art 10(1)(a) of the Federal Constitution. He submitted that the answers to questions 1 and 2 should be in the negative.

THE PLAINTIFFS' SUBMISSION

[24] Learned counsel for the plaintiffs in substance contended that the right of the government to sue in civil proceedings including for defamation was a statutory right conferred by s 3 of Act 359 and was not dependent upon the common law of England. In suing the defendant for defamation, the plaintiffs relied upon a right conferred upon an Act of Parliament. Therefore, the English common law principles relating to suits for defamation by organs of government as enunciated in *Derbyshire* have no relevancy to the issue as to whether the plaintiffs can sue for defamation in this case.

[25] Learned counsel submitted that the government's statutory right to sue for defamation is subject to written law and the expression written law, includes the 'Constitution of the Federation'. It is also accepted that art 10 of the Federal Constitution guarantees freedom of speech or expression. But, that freedom of expression or speech is not absolute. That constitutional right to freedom of speech and expression by virtue of art 10 is subject to the limitations or restrictions imposed by that article.

[26] Learned counsel argued that art 10 does not impose any restriction or prohibition on the government to sue a citizen for defamation. On the contrary, it imposes restrictions on freedom of speech and expression and such restrictions may be provided in the law passed by Parliament on defamation. In other words, as pointed out by the Federal Court in the *Ling Wah Press (M) Sdn Bhd & Ors v Tan Sri Dato Vincent Tan Chee Yioun* [2000] 4 MLJ 77; [2000] 3 CLJ 728, the exercise of the right to freedom of speech, conferred by art 10(1)(b) does not allow a citizen to have a 'licence to defame others'. And, as pointed out by the Federal Court in the *Ling Wah Press* case, and in the minority judgment of the Court of Appeal in the instant case, a citizen has a right to reputation and that right is protected by law and indeed, the restrictions imposed by art 10(2)(a) implicitly recognise and safeguard the right of a citizen to reputation which must not be damaged through the exercise of the right of freedom of speech. Since a citizen or subject of this country has a right of action against another citizen/subject to sue for defamation in proceedings in court, to protect his reputation, then by reason of s 3 of Act 359, the government who has a 'governing reputation' or 'corporate reputation' to

protect, would likewise be entitled to sue for defamation if its reputation is maligned by reckless exercise of the right of free speech or expression.

[27] According to the learned counsel, recognising the right of the government to sue for defamation under s 3 of Act 359 is not against the fundamental right conferred by art 10(1)(a) of the Federal Constitution, of freedom of speech and expression which is not an absolute right. He pointed out that the Reid Commission in its 'Federation of Malaya Constitutional Commission 1955–1957 Report' at para 162 recommended as follows:

> We further recommend that freedom of speech and expression should be guaranteed to all citizens subject to restrictions in the interests of security, public order or morality or in relation to incitement, defamation and contempt of court.

Article 10 of the Federal Constitution was framed in accordance with that recommendation.

[28] Learned counsel also contended that there can be no application of the principle of the English common law as laid down by the English courts in *Derbyshire* by reason of the clear provisions of s 3 of Act 67. The questions whether the government can sue for defamation and to what extent the exercise of such statutory right affect the freedom of expression, are issues which must be determined according to the provisions made under Malaysian statutes including the Federal Constitution.

DECISION OF THIS COURT

[29] The starting point is the *Derbyshire* case itself. The facts of the case in *Derbyshire* as stated in the head notes are as follows. The plaintiff, a local authority, brought an action for damages for libel against the defendants in respect of two newspaper articles which had questioned the propriety of investments made for its superannuation fund. On a preliminary issue as to whether the plaintiff had a cause of action against the defendants, the judge held that a local authority could sue for libel in respect of its governmental and administrative functions, and dismissed the defendants' application to strike out the statement of claim. On appeal by the defendants, the Court of Appeal held that the plaintiff could not bring the action for libel. The House of Lords in dismissing the plaintiff's appeal held that since it was of the highest public importance that a democratically elected governmental body should be open to uninhibited public criticism, and since the threat of civil actions for defamation would place an undesirable fetter on the freedom to express such criticism, it would be contrary to the public interest for institutions of central or local government to have any right at common law to maintain an action for damages for defamation; and that, accordingly, the plaintiff was not entitled to bring an action for libel against the defendants, and its statement of claim would be struck out.

[30] In his leading judgment, Lord Keith of Kinkel said: A

There are, however, features of a local authority which may be regarded as distinguishing it from other types of corporation, whether trading or non-trading. *The most important of these features is that it is a governmental body. Further, it is a democratically elected body, the electoral process nowadays being conducted almost exclusively on party political lines. It is of the highest public importance that a democratically elected governmental body, or indeed any governmental body, should be open to uninhibited public criticism. The threat of a civil action for defamation must inevitably have an inhibiting effect on freedom of speech.* In *City of Chicago v Tribune Co* (1923) 139 NE 86 the Supreme Court of Illinois held that the city could not maintain an action of damages for libel. Thompson CJ said, at p 90: B C

> The fundamental right of freedom of speech is involved in this litigation, and not merely the right of liberty of the press. If this action can be maintained against a newspaper it can be maintained against every private citizen who ventures to criticise the ministers who are temporarily conducting the affairs of his government. Where any person by speech or writing seeks to persuade others to violate existing law or to overthrow by force or other unlawful means the existing government, he may be punished ... but all other utterances or publications against the government must be considered absolutely privileged. While in the early history of the struggle for freedom of speech the restrictions were enforced by criminal prosecutions, it is clear that a civil action is as great, if not a greater, restriction than a criminal prosecution. If the right to criticise the government is a privilege which, with the exceptions above enumerated, cannot be restricted, then all civil as well as criminal actions are forbidden. A despotic or corrupt government can more easily stifle opposition by a series of civil actions than by criminal prosecutions ... D E F

After giving a number of reasons for this, he said, at p 90:

> It follows, therefore, that every citizen has a right to criticise an inefficient or corrupt government without fear of civil as well as criminal prosecution. This absolute privilege is founded on the principle that it is advantageous for the public interest that the citizen should not be in any way fettered in his statements, and where the public service or due administration of justice is involved he shall have the right to speak his mind freely. G

These propositions were endorsed by the Supreme Court of the United States in *New York Times Co v Sullivan* (1964) 376 US 254, 277. *While these decisions were related most directly to the provisions of the American Constitution concerned with securing freedom of speech, the public interest considerations which underlaid them are no less valid in this country. What has been described as 'the chilling effect' induced by the threat of civil actions for libel is very important.* Quite often the facts which would justify a defamatory publication are known to be true, but admissible evidence capable of proving those facts is not available. This may prevent the publication of matters which it is very desirable to make public. ... H I

...

It is of some significance to observe that a number of departments of central government in the United Kingdom are statutorily created corporations, including

A the Secretaries of State for Defence, Education and Science, Energy, Environment and Social Services. If a local authority can sue for libel there would appear to be no reason in logic for holding that any of these departments (apart from two which are made corporations only for the purpose of holding land) was not also entitled to sue. But as is shown by the decision in *Attorney General v Guardian Newspapers Ltd (No 2)* [1990] 1 AC 109, a case concerned with confidentiality, there are rights available to private citizens which institutions of central government are not in a position to exercise unless they can show that it is the public interest to do so. The same applies, in my opinion, to local authorities. In both cases *I regard it as right for this House to lay down that not only is there no public interest favouring the right of organs of government, whether central or local, to sue for libel, but that it is contrary to the public interest that they should have it. It is contrary to the public interest because to admit such actions would place an undesirable fetter on freedom of speech.*

[31] Continuing his speech, His Lordship then referred to the South African case of *Die Spoorbond v South African Railways* [1946] AD 999:

In *Die Spoorbond v South African Railways* [1946] AD 999 the Supreme Court of South Africa held that the South African Railways and Harbours, a governmental department of the Union of South Africa, was not entitled to maintain an action for defamation in respect of a publication alleged to have injured its reputation as the authority responsible for running the railways. Schreiner JA said, at pp 1012–1013:

> I am prepared to assume, for the purposes of the present argument, that the Crown may, at least in so far as it takes part in trading in competition with its subjects, enjoy a reputation, damage to which could be calculated in money. On that assumption there is certainly force in the contention that it would be unfair to deny to the Crown the weapon, an action for damages for defamation, which is most feared by calumniators. Nevertheless it seems to me that considerations of fairness and convenience are, on balance, distinctly against the recognition of a right in the Crown to sue the subject in a defamation action to protect that reputation. The normal means by which the Crown protects itself against attacks upon its management of the country's affairs is political action and not litigation, and it would, I think, be unfortunate if that practice were altered. At present certain kinds of criticism of those who manage the state's affairs may lead to criminal prosecutions, while if the criticism consists of defamatory utterances against individual servants of the state actions for defamation will lie at their suit. But subject to the risk of these sanctions and to the possible further risk, to which reference will presently be made, of being sued by the Crown for injurious falsehood, any subject is free to express his opinion upon the management of the country's affairs without fear of legal consequences. I have no doubt that it would involve a serious interference with the free expression of opinion hitherto enjoyed in this country if the wealth of the state, derived from the state's subjects, could be used to launch against those subjects actions for defamation because they have, falsely and unfairly it may be, criticised or condemned the management of the country. Such actions could not, I think, be confined to those brought by the railways administration for criticism of the running of the railways. Quite a number of government departments, as appeared in the course of the argument, indulge in some form of trading on a greater or a lesser scale.

> Moreover, the government, when it raises loans, is interested in the good or bad reputation that it may enjoy among possible subscribers to such loans. It would be difficult to assign any limits to the Crown's right to sue for defamation once its right in any case were recognised.

These observations may properly be regarded as no less applicable to a local authority than to a department of central government. In the same case Watermeyer CJ, at p1009, observed that the reputation of the Crown might fairly be regarded as distinct from that of the group of individuals temporarily responsible for the management of the railways on its behalf. In the case of a local authority temporarily under the control of one political party or another it is difficult to say that the local authority as such has any reputation of its own. Reputation in the eyes of the public is more likely to attach itself to the controlling political party, and with a change in that party the reputation itself will change. A publication attacking the activities of the authority will necessarily be an attack on the body of councillors which represents the controlling party, or on the executives who carry on the day to day management of its affairs. *If the individual reputation of any of these is wrongly impaired by the publication any of these can himself bring proceedings for defamation*. Further, it is open to the controlling body to defend itself by public utterances and in debate in the council chamber.

The conclusion must be, in my opinion, that under the common law of England a local authority does not have the right to maintain an action of damages for defamation.

[32] Although in *Derbyshire* no individual was a party to the claim and thus, the right of individual officers or employees of the organs of government to sue for defamation was not directly in issue in the case, in the aforesaid speech Lord Keith acknowledged the fact that an individual can sue for defamation:

> Reputation in the eyes of the public is more likely to attach itself to the controlling political party, and with a change in that party the reputation itself will change. A publication attacking the activities of the authority will necessarily be an attack on the body of councillors which represents the controlling party, or on the executives who carry on the day to day management of its affairs. If the individual reputation of any of these is wrongly impaired by the publication any of these can himself bring proceedings for defamation. Further, it is open to the controlling body to defend itself by public utterances and in debate in the council chamber.

[33] Question 1 raises the issue whether the principle decided in *Derbyshire* that under the common law of England, organs of central or local government do not have the right to sue for damages for defamation can be applied in Sarawak?

[34] In *Public Services Commission Malaysia & Anor v Vickneswary a/p RM Santhivelu (substituting M Senthivelu a/l R Marimuthu, deceased)* [2008] 6 MLJ 1; [2008] 6 CLJ 573, this court made it clear that our courts should not import common law from other countries when legislation in Malaysia has clearly provided for the principle of law to be applied. In that case, Zaki Tun

Azmi PCA (as he then was) delivering the judgment of the court said:

[16] It is quite well established that the courts in Malaysia should be wary in adopting principles of law which is based on the common law of England when there is specific provision in our statute. Jemuri Serjan J in *Ghazi bin Mohd Sawi v Mohd Haniff bin Omar, Ketua Polis Negara & Anor* [1994] 2 MLJ 114; [1994] 2 CLJ 333 said this:

> Lest we forget in that case His Lordship was *dealing with judicial review at common law and the passage above does not apply to a case regulated by statutes or subsidiary legislation which have legislative effect.*
>
> ...
>
> Similarly, in this case, we have examined the relevant provisions of the General Orders 1980 (Chapter D), and it is beyond dispute that these provisions have been assiduously followed by the respondent, and having regard to all the authorities cited earlier on an oral hearing or inquiry under the circumstances of this case was not justified. In dealing with General Orders 1980 (Chapter D) we remind ourselves that we are dealing with General Orders that have legislative effect and we must guard ourselves against adding words into them which were never intended. In this regard, we found support in the passage of the judgment of Barwick CJ in *Twist v Randwick Municipal Council* [1976] 136 CLR 106 at p 110:
>
> > *... if the legislation has made provision for that opportunity to [to be heard] to be given to the subject before his person or property is so affected, the Court will not be warranted in supplementing the legislation, even if the legislative provision is not as full and complete as the Court might think appropriate.* Thus, if the Legislature has addressed itself to the question whether an opportunity should be afforded the citizen to be relevantly heard and has either made it clear that no such opportunity is to be given or has, by its legislation, decided what opportunity should be afforded, the Court being bound by the legislation as much as is the citizen, has no warrant to vary the legislative scheme.
>
> ...

[18] In *Raphael Pura v Insas Bhd & Ors* [2003] 1 MLJ 513; [2003] 1 CLJ 61, Abdul Hamid Mohamad FCJ (as he then was) said:

> *In my view, this court is bound by the provisions of our own Rules and not that of any other country*. ...
>
> Furthermore, this court too should be careful and slow to adopt the decisions of the courts in other countries, even on the basis that it forms parts of the common law of England, which on this point, it is not. Particular attention must be paid to the written law of this country. In other words, the provisions of s 3(1) of the Civil Law Act 1956, must always be borne in mind.

[19] In a subsequent case of *Robert Lee @ Rober Seet & Anor v Wong Ah Yap & Anor* [2007] 4 MLJ 393; [2007] 4 CLJ 1, the same learned Federal Court judge (as he then was) reiterated that principle by saying:

> It is true that the courts, through its decisions try to arrive at a 'fair and just' result. But, it can only do so within the confines of the law, not through some general and vague sense of fairness and justice. ...
>
> [20] Earlier to this, the Supreme Court in *Chung Khiaw Bank Ltd v Hotel Rasa Sayang Sdn Bhd & Anor* [1990] 1 MLJ 356; [1990] 1 CLJ 675; [1990] 1 CLJ Rep 57 held:
>
> > (d) Because the principle of the common law has been incorporated into statutory law ... the trend or any change in the common law elsewhere is not relevant. Any change in the common law after 7 April 1956 shall be made by our own courts. ...
> >
> > ...
>
> [21] ... *it is clear that the courts should not import common law from other countries where legislation in Malaysia has clearly provided for it.*

[35] In Malaysia the right of the federal government and the government of the states to sue is a statutory right. It is specifically provided by Act 359. According to the long title to the Act, it is an Act relating to proceedings by and against the federal government and the government of the states. The right of the government (and specifically in the context of the present appeal, the right of the State of Sarawak) to sue is provided by s 3 of Act 359. Section 3 of that Act provides:

> 3 *Subject to this Act and of any written law* where the Government has a claim against any person which would, if such claim had arisen between subject and subject, afford ground of civil proceedings, the claim may be enforced by proceedings taken by or on behalf of the Government for that purpose in accordance with this Act.

[36] Under s 3 of the Interpretation Acts 1948 and 1967 (Act 388), the words 'written law' means:

> (a) the Federal Constitution and the Constitutions of the States and subsidiary legislation made thereunder;
>
> (b) Acts of Parliament and subsidiary legislation made thereunder;
>
> (c) Ordinances and Enactments (including any federal or State law styling itself an Ordinance or Enactment) and subsidiary legislation made thereunder; and
>
> (d) any other legislative enactments or legislative instruments (including Acts of Parliament of the United Kingdom of Great Britain and Northern Ireland and Orders in Council and other subsidiary legislation made thereunder) which are in force in Malaysia or any part thereof;

[37] The aforesaid definition of 'written law' does not include 'common law' which under Act 388 means 'the common law of England'. Thus, the statutory right of the government to sue in civil proceedings under s 3 of Act 359

including for defamation is not subject to the common law of England.

[38] Act 359 does not preclude the government from taking civil action for defamation. Indeed, s 2(2) of Act 359 which defines 'Government' to include the federal government and the government of the states, also provides a wide definition of 'civil proceedings':

> 'civil proceedings' means any proceeding *whatsoever* of a civil nature before a court and includes proceedings for the recovery of fines and penalties and an application at any stage of a proceeding, but does not include proceedings under Chapter VIII of the Specific Relief Act 1950 [Act 137], or such proceedings as would in England be brought on the Crown side of the Queen's Bench Division;

According to the majority of the Court of Appeal:

> The term 'civil proceedings' used in s 3 is defined by s 2(2) to mean 'any proceeding whatsoever of a civil nature before a court' and the operative words in s 3 are 'which would, if such claim had arisen between subject and subject, afford ground for civil proceedings', meaning to say if a claim affords ground for civil proceedings between private individuals, it will afford ground for civil proceedings between the government and private individuals. Thus, if a claim affords ground for an action in defamation (which is a form of civil action) between private individuals, it will afford ground for an action in defamation between the government and private individuals. That in our view is the proper construction to be given to s 3 of the Government Proceedings Act and will not in any way result in an absurdity or be in breach of any canon of statutory interpretation.

[39] We agree. Under s 3 of Act 359, if an individual makes an allegation critical of a government, which allegation if made against another individual would afford ground for that other individual to sue, then the government may sue in defamation. We also agree that there is nothing under s 3, indeed under Act 359 which could be construed to prohibit or restrict the government from suing in defamation.

[40] In his submission learned counsel for the defendant submitted that the government or government bodies, being the democratically elected bodies has no 'governing reputation'. In support he cited *Gatley on Libel and Slander* (10th Ed) para 8.20, where the learned author stated that 'the former view that a local government corporation had a 'governing reputation' which was protected by the law of defamation no longer represents English law'. According to the learned counsel, the view that the government had a 'governing reputation' to protect was originally pronounced in *Bognor Regis Urban District Council v Campion* [1972] 2 All ER 61; [1972] 2 QB 169, but it has been overruled by the House of Lords in *Derbyshire*, which stated that *Bognor Regis* was wrongly decided.

[41] Learned counsel only referred to the first sentence in para 8.20 of *Gatley*

on Libel and Slander (10th Ed); not the whole paragraph. It is necessary therefore, to consider that sentence in its proper context. To do this, it is crucial to consider the whole of para 8.20 of that book which appears at p 212 which is as follows:

> 8.20 *Governmental bodies. The former view that a local government corporation had a 'governing' reputation which was protected by the law of defamation no longer represents English law.* In *Derbyshire County Council v Times Newspapers* the House of Lords held that at common law, and without reference to the guarantee of freedom of expression in art 10 of the European Convention on Human Rights, an organ of local government may not bring an action for defamation. This rests not upon any absence of likely damage to such a body, for in many cases the considerations which apply to a trading or charitable corporation may also apply to a government body, but upon the likely chilling effect on free speech of granting a right of action. Though the case concerned a local authority the same rule applies to an organ of central government: neither the Crown nor a government department which has corporate status may sue for defamation. It 'would be a serious interference with the free expression of opinion hitherto enjoyed. ... if the wealth of the State, derived from the State's subjects, could be used to launch against those subjects actions for defamation because they have, falsely and unfairly it may be, criticised or condemned the management of the country'. The question in the *Derbyshire* case was said to be whether the authority was entitled to maintain an action for words which reflected on its 'governmental and administrative functions' and its operation of its pension fund, to which the alleged libel related, was clearly thought to fall within that, but it is submitted that the same rule applies even where the activity referred to could properly be described as trading.

[42] Paragraph 8.20 does not support the submission made by learned counsel. That paragraph captures the essence of the *Derbyshire* principle. It is clear that in *Derbyshire* the House of Lords decided that local government corporation could not sue for defamation (overruling *Bognor Regis*) not because it held that government corporation had no 'governing reputation' but because of the likely chilling effect on freedom of speech of granting a right to sue, which is evident from the relevant passages in the judgment of Lord Keith of Kinkel which we have quoted in extenso earlier. Thus, we are unable to accept learned counsel's submission that the government has no reputation. In this regard, in rejecting similar submission made by learned counsel for the defendant in the Court of Appeal, the majority held (and rightly in our view) as follows:

> [33] Mr Chong Siew Chiang submitted that it has none. We respectfully disagree as reputation is not the exclusive right of a natural person or a body corporate to protect. While it is true that the government cannot be injured in its feelings, its reputation can be injured by a libel.
>
> [34] Thus, anything that is said about the government that has a tendency to lower its reputation in the estimation of right thinking members of the public, or to

A expose it to hatred, contempt or ridicule, will give rise to a cause of action in defamation. It is the same test that is applicable in a claim for defamation between private individuals.

[35] We are not suggesting of course that the government cannot be criticised. It can and that right to criticise must be protected as it is a symbol of a functioning B democracy. What cannot be done however is to defame the government. ...

[43] This takes us to question 2. Since the principle expounded by *Derbyshire* is a principle under the common law of England, it is necessary to consider the extent of the application of the common law of England in C Malaysia. This brings into focus the Civil Law Act 1956 (Act 67). Section 3(1) of Act 67 provides:

3(1) Save so far as other provision has been made or may hereafter be made by any written law in force in Malaysia, the Court shall —

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(a) in West Malaysia or any part thereof, apply the common law of England and the rules of equity as administered in England on the 7th day of April 1956;

(b) in Sabah, apply the common law of England and the rules of equity, together with statutes of general application, as administered or in force in E England on the 1st day of December 1951;

(c) in Sarawak, apply the common law of England and the rules of equity, together with statutes of general application, as administered or in force in England on the 12th day of December 1949, subject however to subsection (3)(ii): F

Provided always that the said common law, rules of equity and statutes of general application shall be applied so far only as the circumstances of the States of Malaysia and their respective inhabitants permit and subject to such qualifications as local circumstances render necessary.

G

[44] How s 3(1) of Act 67 works was explained by Abdul Hamid Mohamed FCJ (later CJ) in *Majlis Perbandaran Ampang Jaya v Steven Phoa Cheng Loon & Ors* [2006] 2 MLJ 389 at pp 413–415:

H [40] That provision was legislated, if I may so, by the British one year before the then Malaya obtained her independence and remains the law of this country for half a century now. Whatever our personal views about it, it is the law and no court can ignore it.

[41] That provision says (I am only referring to common law) that the court shall apply the common law of England as administered of England on the given dates I *provided that no provision has been made or may hereafter be made by any written law in force in Malaysia*. Even then, *it is further qualified that it is only applicable so far only as the circumstances of the States of Malaysia and their respective inhabitants permit and subject to such qualifications as local circumstances render necessary.*

[42] Strictly speaking, when faced with the situation whether a particular principle

of common law of England is applicable, *first, the court has to determine whether there is any written law in force in Malaysia. If there is, the court does not have to look anywhere else. If there is none, then the court should determine what is the common law as administered in England on 7 April 1956, in the case of West Malaysia. Having done that the court should consider whether 'local circumstances' and 'local inhabitants' permit its application, as such. If it is 'permissible' the court should apply it. If not, in my view, the court is free to reject it totally or adopt any part which is 'permissible', with or without qualification. Where the court rejects it totally or in part, then the court is free to formulate Malaysia's own common law. In so doing, the court is at liberty to look at other sources, local or otherwise, including the common law of England after 7 April 1956 and principles of common law in other countries.*

[43] In practice, lawyers and judges do not usually approach the matter that way. One of the reasons, I believe, is the difficulty in determining the common law of England as administered in England on that date. Another reason which may even be more dominant, is that both lawyers and judges alike do not see the rational of Malaysian courts applying 'archaic' common law of England which reason, in law, is difficult to justify. As a result, quite often, most recent developments in the common law of England are followed without any reference to the said provision. However, this is not to say that judges are not aware or, generally speaking, choose to disregard the provision. Some do state clearly in their judgments the effects of that provision. For example, in *Syarikat Batu Sinar Sdn Bhd & Ors v UMBC Finance Bhd & Ors* [1990] 3 MLJ 468 Peh Swee Chin J (as he then was) referring to the proviso to s 3(1) said:

> We have to develop our own Common law just like what Australia has been doing, by directing our mind to the 'local circumstances' or 'local inhabitants'.

[44] In *Chung Khiaw Bank Ltd v Hotel Rasa Sayang Sdn Bhd & Anor* [1990] 1 MLJ 356 the Supreme Court, inter alia, held:

> (4) Because the principle of common law has been incorporated into statutory law as contained in s 24 of the Contracts Act 1950, the trend on any change in the common law elsewhere is not relevant. Any change in the common law after 7 April 1956 shall be made by our own courts.

[45] In the judgment of the court in that case, delivered by Hashim Yeop Sani CJ (Malaya), the learned CJ (Malaya), said, at pp 361–362:

> Section 3 of the Civil Law Act 1956 directs the courts to apply the common law of England only in so far as the circumstances permit and save where no provision has been made by statute law. The development of the common law after 7 April 1956 (for the States of Malaya) is entirely in the hands of the courts of this country. We cannot just accept the development of the common law in England. See also the majority judgments in *Government of Malaysia v Lim Kit Siang* [1988] 2 MLJ 12.

[46] That case is an example where our statute has made specific provisions incorporating the principles of common law of England. However, it shows the effect on the application of the common law in England. ...

[45] So, it is clear that when faced with the situation whether a particular principle of common law of England is applicable, first, the court has to determine whether there is any written law in force in Malaysia. If there is, the court does not have to look anywhere else. In the present appeal, the answer to the question must be in the affirmative. As has been shown earlier, Act 359 is the specific law in force which governs proceedings by and against the federal government and the state governments including the State Government of Sarawak. The right of the government including the State Government of Sarawak to sue including to sue for defamation is statutorily provided under s 3 of Act 359. Hence, the English common law principle expounded in *Derbyshire* does not apply. Our answer to question 2 is therefore in the affirmative.

[46] Additionally, in our view there is also another reason why *Derbyshire* principle is not suitable for application in Malaysia. As would be recalled, learned counsel for the defendant contended that not only was there no public interest favouring the rights of the plaintiffs to sue for defamation, it was contrary to the public interest that they should have that right. In addition, according to him it was directly against the fundamental right of freedom of expression under art 10(1)(a) of the Federal Constitution. We are unable to agree. The decision in *Derbyshire* was based on the English common law that there is no public interest favouring organs of government to sue, and that it is contrary to the public interest that they should have it because to admit such action would place an undesirable fetter on the freedom of speech. To repeat the words of Lord Keith in *Derbyshire*, '... the chilling effect induced by the threat of civil actions for libel is very important'. The rule that precludes the government from suing for defamation appears to apply even to a situation where, 'quite often the facts which would justify a defamatory publication are known to be true, but admissible evidence capable of proving those facts is not available. This may prevent the publication of matters which it is very desirable to make public'. This raises an interesting question as to how the facts (which would justify a defamatory publication) can be known to be true when admissible evidence capable of proving those facts (which would justify the defamatory publication) is not available. However, in Malaysia the freedom of speech is provided under art 10 of the Federal Constitution. That right is not absolute or unfettered (see *Public Prosecutor v Azmi bin Sharom* [2015] 6 MLJ 751; [2015] 8 CLJ 921 (FC)). Article 10 of the Federal Constitution provides:

> 10 Freedom of speech, assembly and association
>
> (1) Subject to Clauses (2), (3) and (4) —
>
> (a) every citizen has the right to freedom of speech and expression;
>
> (b) all citizens have the right to assemble peaceably and without arms;
>
> (c) all citizens have the right to form associations.

(2) Parliament may by law impose —

(a) on the rights conferred by paragraph (a) of Clause (1), such restrictions as it deems necessary or expedient in the interest of the security of the Federation or any part thereof, friendly relations with other countries, public order or morality and *restrictions designed* to protect the privileges of Parliament or of any Legislative Assembly or *to provide against contempt of court, defamation, or incitement to any offence*;

(b) on the right conferred by paragraph (b) of Clause (1), such restrictions as it deems necessary or expedient in the interest of the security of the Federation or any part thereof or public order;

(c) on the right conferred by paragraph (c) of Clause (1), such restrictions as it deems necessary or expedient in the interest of the security of the Federation or any part thereof, public order or morality.

[47] It is clear that while the right of the freedom of speech is guaranteed under art 10(1)(a) of the Federal Constitution, art 10(2)(a) has imposed restrictions by authorising Parliament to enact laws it deems necessary to provide for *defamation*, or incitement to any offence. In *Ling Wah Press (M) Sdn Bhd & Ors v Tan Sri Dato Vincent Tan Chee Yioun* [2000] 4 MLJ 77 at p 85; [2000] 3 CLJ 728 at p 737, this court said:

> Counsel also submitted that large damages if allowed to stand would have a chilling effect on the freedom of speech and expression as guaranteed by art. 10 of the Federal Constitution. We are of the view that freedom of speech is not an absolute right. Freedom of speech is not a licence to defame people. It is subject to legal restrictions. An absolute or unrestricted right to free speech would result in persons recklessly maligning others with impunity, and the exercise of such right would do the public more harm than good. Every person has a right to reputation and that right ought to be protected by law — *Jeyaretnam Joshua Benjamin v Lee Kuan Yew & Anor* [1992] 2 SLR 310 at p 332.
>
> Article 10 of the Federal Constitution itself while guaranteeing every citizen the right to freedom of speech and expression has imposed restrictions by authorising Parliament to enact laws which it deems necessary to provide against contempt of court, defamation or incitement to any offence.

In the context of the present appeal, the right of the freedom of speech is subject to the law of defamation. In this regard, the following observation of the majority of the Court of Appeal is not inappropriate:

> To allow absolute and unfettered freedom to defame the government (as opposed to fair comment or criticism) all in the name of freedom of speech and expression is to allow lawlessness to prevail. We must not be blind to the reality that behind every government is a political party or a coalition of political parties, with power politics being the *raison d'etre* for their existence. A defamatory attack on the government, especially by members of a rival political party will be taken as an attack on the political party or parties behind the government. This applies across the board to any political entity that forms the government of the day and to those who defame

it. This is not to bring politics into the equation but merely to illustrate the point that making unrestrained defamatory statements against the government using freedom of speech and expression as the mantra is a dangerous political manoeuvring that can trigger a chain of negative and even violent political reactions that can spiral out of control. We must never underestimate the destructive power of words.

[48] Question 3 concerns the application of O 14A of the ROC. According to the majority of the Court of Appeal, to remit back the case to the High Court for trial would defeat the whole purpose of the provisions under O 14A of the ROC. According to the majority:

> [85] When the learned judge decided to hear the case in accordance with the procedure prescribed by O 14A, she must have been satisfied that the four questions posed by the respondent were suitable for determination without the full trial of the action and that such determination would finally determine the entire cause of the matter. That would also have been what the respondent had in mind when making the application under O 14A.
>
> [86] Thus, when the learned judge dismissed the appellants' claim in its entirety after determining question (1) in favour of the respondent and questions (2), (3) and (4) in favour of the appellants, Her Ladyship had in fact finally determined the entire cause of the matter pursuant to O 14A r (2), exactly as intended by the respondent. Had question (1) been answered in favour of the appellants along with question (2), (3) and (4), final judgment would have been entered against the respondent.
>
> [87] To now allow the case to proceed to trial despite having been finally disposed of under O 14A is to open the floodgates for such applications to be made piecemeal and by installment. Technically, it is still open to the respondent to make another such application if we were to remit the case back to the High Court for trial.
>
> [88] Considering that a decision under O 14A is a final decision in that it finally determines the rights of the parties and therefore appealable to this court and potentially to the Federal Court with leave, any further appeal upon further determination under O 14A will further delay the final disposal of the case. We do not think we should set a dangerous precedent by allowing trial after a determination under O 14A.
>
> [89] A litigant who moves the court under O 14A must not pose the questions out of curiosity just to see what the court's views will be on the points of law that he is posing for determination. That will be an abuse of process. Once the questions are cast in stone and determined by the court, he is bound by the decision in the same way that the opposing party is bound by the decision, either for the entire claim to be dismissed or for final judgment to be entered. The matter must end there.
>
> [90] If a litigant omits to include any question of law that is determinative of the rights of the parties and fails in his application, he cannot turn around and say that the case must nevertheless proceed to trial as the court has yet to decide on the remaining issues of law that he omitted to include in the O 14A application. He cannot have the best of both worlds and to approbate and reprobate.

[49] The majority held that, since all the four questions were answered in favour of the plaintiffs, the claim of the plaintiffs had been established without any further need to hear evidence from the defendant, nor for further argument before the learned High Court judge. In the circumstances, judgment was entered against the defendant in terms of prayers (1) and (2) of the amended statement of claim. Damages was ordered to be assessed by the Deputy Registrar of the High Court.

[50] Learned counsel for the defendant submitted that an application made pursuant to O 14A need not determine the entire cause or matter, and that the approach applied by the majority of the Court of Appeal went against the weight of authorities. In *Petroleum Nasional Bhd v Kerajaan Negeri Terengganu* [2004] 1 MLJ 8, the Court of Appeal espoused that O 14A of the ROC 'also permits any claim or issue herein to be so determined, but the question must be question of law or construction of document'. The Court of Appeal also quoted with approval a passage from the judgment of Jessel MR in *Pooley v Driver* (1876) 5 Ch D 458 at p 460:

> ... the court will, at the trial of an action involving both questions of law and of fact, decide the question of law first, if it shall appear that the decision of such question may render it unnecessary to try the question of fact.

[51] Learned counsel also referred to *Kerajaan Negeri Kelantan v Petroliam Nasional Bhd and other appeals* [2014] 6 MLJ 31; [2014] 7 CLJ 597, where the Federal Court remarked that:

> It follows that the whole case does not have to be disposed of but it is sufficient if substantial matters can be disposed of ...

[52] Learned counsel contended that to force a party to waive all his defences if he elected to proceed by way of O 14A went against the reason why the provision thereunder was enacted — to save time and cost if a particular issue of law or interpretation (which could have overall or substantial impact on the case) could be determined at the earlier opportunity. He argued that the judgment of the majority of the Court of Appeal had effectively altered the true purpose of O 14A.

[53] Continuing his submission, learned counsel contended that it was undisputed that the High Court judge had answered in the affirmative the question of whether the impugned words were capable of bearing a defamatory meaning in law. However, he argued that the Court of Appeal subsequently conflated the discrete notions of whether the impugned words were capable of bearing a defamatory meaning in law and whether in fact, the impugned words bore a defamatory meaning. In the present case, the High Court judge had determined the question of law, namely, whether the impugned words were

capable of bearing a defamatory meaning. However, the distinction between that legal determination and the factual question of whether the impugned words actually bore a defamatory meaning was clear. Learned counsel referred to *Berkoff v Burchill and another* [1996] 4 All ER 1008 where at p 1011, Neill LJ said as follows:

> The question of fact: libel or no libel, is a matter for the jury. But the court has jurisdiction to rule that as a matter of law words are incapable of being defamatory.

[54] This distinction, learned counsel submitted, could be seen from the observation by the House of Lords in *Sim v Stretch* [1936] 2 All ER 1237 at p 1240:

> It is well settled that the judge must decide whether the words are capable of a defamatory meaning. That is a question of law: is there evidence of a tort? If they are capable, then the jury is to decide whether they are in fact defamatory.

[55] Learned counsel argued that the factual component of the determination as to whether the impugned words actually bore a defamatory meaning had yet to be decided by the High Court, and in fact, could not possibly have been decided in the course of an O 14A application.

[56] He also submitted that apart from this question of fact, the O 14A application did not deal with the remaining defences raised by the defendant, namely, justification, fair comment and qualified privilege. He argued that the Court of Appeal erred in failing to appreciate that these other issues required resolution by way of viva voce evidence at trial. The failure of the Court of Appeal to remit the case to the High Court for trial was a serious misdirection of law amounting to a miscarriage of justice, rendering the decision bad in law and unsustainable.

[57] The question whether the impugned words were in fact defamatory of the plaintiffs and the issues of qualified privilege, justification and fair comment were not raised in the interlocutory application nor argued before either the High Court or the Court of Appeal. Therefore, learned counsel contended it was improper and unjust for the Court of Appeal to deprive the defendant of his right to a proper trial of the remaining issues before the High Court. Such deprivation constitutes a fundamental breach of the rules of natural justice. The majority decision of the Court of Appeal in the instant case effectively usurped the function and jurisdiction of the High Court. In the circumstances, he prayed that the Court of Appeal's decision be set aside.

[58] Learned counsel submitted that question 3 ought to be answered in the negative as the defendant should not be deemed to have abandoned all other issues or defences pleaded simply by virtue of the O 14A application.

[59] In support of the majority decision of the Court of Appeal in entering judgment in favour of the Plaintiffs as stated in para [13] of this judgment, learned counsel for the plaintiffs submitted that in the consideration of question 3, the following facts are relevant and must be taken into account:

(a) the O 14A application was taken out by the defendant and the application was allowed to proceed notwithstanding the plaintiffs' submission that this was not a fit and proper case for determination under O 14A;

(b) the questions of law for determination under O 14A were framed by the defendant;

(c) in the O 14A application, the defendant did not seek an order that after the questions of law had been determined there were other issues, particularly those raised in the defence by the defendant which would have to be determined. The defendant took the position that the questions of law would completely determine or dispose of the entire action. The learned High Court judge in her ruling, agreeing to hear the O 14A application said:

> Furthermore, if one or several of the questions framed are answered in the plaintiff's favour, a long, costly and protracted trial can be avoided, which at the end of the day, would benefit both the winner and the loser in that one would obtain a speedy and just conclusion to his/their case whilst the other, a saving on costs; not to mention the judicial time for the court.
>
> Therefore the High Court had allowed the O 14A application to proceed with the express purpose of avoiding a lengthy trial and with a view to saving legal costs and judicial time;

(d) the defendant did not ask for an order that there should be a full trial on the other issues (especially those raised in the defence) which were not embodied in the four questions framed by him for his O 14A application. Had the defendant included such a prayer, on the basis of the aforesaid reasoning given by the learned High Court judge, the O 14A application would not have been allowed to proceed as it would not avoid a lengthy trial and would not save legal costs or judicial time; and

(e) the defendant had chosen not to appeal or cross appeal against the ruling of the learned judge of the High Court that the words complained of were defamatory of the plaintiff. The ruling remained unchallenged and by allowing such a ruling to remain, it must be implied that the defendant did not want to pursue with the other defences to resist the plaintiffs' claim for damages.

[60] Order 14A of the ROC provides:

(1) The Court may, upon the application of a party or of its own motion, *determine any question of law* or construction of any document arising in any cause or matter at any stage of the proceedings where it appears to the Court that —

(a) such question is suitable for determination without the full trial of the action; and

(b) such determination will finally determine the entire cause or matter or *any claim or issue* therein.

(2) On such determination the Court may dismiss the cause or matter or make such order or judgment as it thinks just.

(3) The Court shall not determine any question under this Order unless the parties have had an opportunity of being heard on the question.

[61] In *Kerajaan Negeri Kelantan v Petroliam Nasional Bhd and other appeals* [2014] 6 MLJ 31; [2014] 7 CLJ 597 at p 600, this court held that the core issue as per the pleadings which was based on the breach of contract cause of action is whether the plaintiff has any rights over petroleum won and saved in the continental shelf off its coast. This core issue has been sufficiently addressed in the proposed questions or issues of law pursuant to O 14A, and it is clear that the outcome of the plaintiff's claim rested entirely on the determination of this core issue. Such determination, further, will be decisive as to the plaintiff's other causes of action (unfair discrimination, constitutional breaches and estoppel) considering that they are grounded on the underlying presumption that the plaintiff has the rights over petroleum located in the continental shelf off its coast. In that case the Federal Court also held that where the question of construction is a dominant feature of the case, the court should proceed to determine that issue, and that the whole case does not have to be disposed of. This is clear from the judgment of Abdul Hamid Embong FCJ delivering the judgment of the court at pp 20–21 (MLJ); pp 625–626 (CLJ):

> [38] The plaintiff's contention with regard to its rights over petroleum won and saved in the continental shelf off its coast in this case is based on the Kelantan petroleum agreement and the Kelantan grant which were entered into between the plaintiff and Petronas pursuant to the provisions of the PDA. Clearly, *this issue is a question of law* which can be resolved by reference and interpretation of the relevant legislations and contractual documentations without having to go for a full trial of the action. It is trite that where the question of construction is a dominant feature of a case, the court should proceed to determine that issue. *It follows that the whole case does not have to be disposed of but it is sufficient if substantial matters can be disposed of* (see *Korso Finance Establishment Anstalt v John Wedge* (Unreported), 15 Feb 1994, CA Transcript No 14/387).

[62] In an action for defamation, the first task of the court is to determine whether the words complained of are capable of bearing a defamatory meaning. This is a question of law which turns upon the construction of the

words published. The next task of the court is to ascertain whether the words complained of are in fact defamatory. This is a question of fact which depends upon the circumstances of the particular case. The steps of the inquiry before the court in an action for defamation was succinctly explained by Gopal Sri Ram JCA (later FCJ) in *Chok Foo Choo @ Chok Kee Lian v The China Press Bhd* [1999] 1 MLJ 371 (CA), at pp 374–375:

> It cannot, I think, be doubted that *the first task of a court in an action for defamation is to determine whether the words complained of are capable of bearing a defamatory meaning. And it is beyond argument that this is in essence a question of law that turns upon the construction of the words published.* As Lord Morris put it in *Jones v Skelton* [1963] 3 All ER 952 at p 958:
>
> > The ordinary and natural meaning of words may be either the literal meaning or it may be an implied or inferred or an indirect meaning: any meaning that does not require the support of extrinsic facts passing beyond general knowledge but is a meaning which is capable of being detected in the language used can be a part of the ordinary and natural meaning of words (see *Lewis v Daily Telegraph Ltd* [1963] 2 All ER 151). The ordinary and natural meaning may therefore include any implication or inference which a reasonable reader, guided not by any special but only by general knowledge and not fettered by any strict legal rules of construction, would draw from the words. The test of reasonableness guides and directs the court in its function of deciding whether it is open to a jury in any particular case to hold that reasonable persons would understand the words complained of in a defamatory sense.
>
> In my judgment, the test which is to be applied lies in the question: do the words published in their natural and ordinary meaning impute to the plaintiff any dishonourable or discreditable conduct or motives or a lack of integrity on his part? If the question invites an affirmative response, then the words complained of are defamatory. (See *JB Jeyaretnam v Goh Chok Tong* [1985] 1 MLJ 334.) Richard Malanjum J, in an admirable judgment in *Tun Datuk Patinggi Haji Abdul-Rahman Ya'kub v Bre Sdn Bhd & Ors* [1996] 1 MLJ 393, collected and reviewed the relevant authorities upon this branch of the subject and I would, with respect, expressly approve the approach adopted by him.
>
> The article in the present instance when read as a whole clearly suggests that the appellant is a person who, under the guise of doing service, was in fact making false statements in order to deceive the people of Lukut. The implication is that the appellant is a man given to deception and is untrustworthy. I think that there can be no doubt that to say of a man that he is a cheat and a liar is a serious defamation of him. It has the effect of lowering the appellant in the estimation of right-thinking members of society generally. It follows that the learned judge in the present case clearly fell into error when he held that the words complained of were not defamatory of the appellant.
>
> *Having decided whether the words complained of are capable of bearing a defamatory meaning, the next step in the inquiry is for a court to ascertain whether the words complained of are in fact defamatory. This is a question of fact dependent upon the circumstances of the particular case.* In England, libel actions are tried by judge and jury and the question is left for the jury to determine. However, in this country, libel

actions are tried by a judge alone, he is the sole arbiter of questions of law as well as questions of fact. He must, therefore, make the determination. In the present instance, it is quite apparent that it is as a matter of pure fact that the article defames the appellant. It literally calls him a cheat and a liar. There can, in my opinion, be no dispute that the appellant was in fact libelled. I am, therefore, unable to agree with the opposite conclusion arrived at by the learned judge who tried the action.

[63] Question No 3 to be determined by the High Court pursuant to the defendant's application under O 14A of the ROC was 'whether the words complained of and set out in para 6 of the amended statement of claim derived from the alleged *Malaysiakini* dated 18 February 2013, *are capable of bearing any defamatory* meaning, and/or are capable of being understood to refer to the first and second plaintiffs as a matter of law'.

[64] That is a question of law which turns upon the construction of the words published. The learned High Court judge answered the question in the affirmative.

[65] The learned judge did not determine the question whether the impugned words were in fact defamatory. She could not have decided so because that question was not before her in the O 14A application. Before her was the question of law. In the application before her, apart from the question of locus standi of the plaintiffs to sue for defamation and the questions relating to pleading (questions 2 and 4), no question relating to the other defence pleaded by the defendant was raised or determined by her. As such in our view, although the majority of the Court of Appeal was right in holding that the plaintiffs have the right to sue and maintain an action for damages for defamation against the defendant, it erred when it held that since all the four questions were answered in favour of the plaintiffs, the claim of the plaintiffs had been established without any further need to hear evidence from the defendant, nor for further argument before the learned High Court judge. Consequently, it also erred when it entered judgment against the defendant in terms of prayers (1) and (2) of the amended statement of claim, and ordered damages to be assessed by the Deputy Registrar of the High Court.

[66] What we have decided thus far would be sufficient to dispose of the appeal. We find no necessity to answer question 3.

CONCLUSION

[67] In the upshot we make the following orders:

(a) the decision of the majority of the Court of Appeal in holding that the plaintiffs have the right to sue and maintain an action for damages for defamation against the defendant is affirmed;

(b) the decision of the majority of the Court of Appeal that the claim of the plaintiffs had been established without any further need to hear evidence from the defendant, nor for further argument before the High Court judge, and its order of entering judgment against the defendant in terms of prayers (1) and (2) of the amended statement of claim and that damages be assessed by the Registrar of the High Court are set aside;

(c) the case be remitted back to the High Court in Kuching for trial of the case until the end which includes the determination of the question whether the impugned words were in fact defamatory of the plaintiffs, the defences of the defendant and assessment of damages if necessary;

(d) the appeal is therefore allowed to that extent; and

(e) we make no order as to costs. The deposit is to be refunded to the defendant.

Order accordingly.

Reported by Ashok Kumar